NO. 49123-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE ESTATE OF JAMES CRAMPTON ROGERS, by and through PAUL CULLEN, Personal Representative of the Estate, et al.,

Appellants,

v.

STATE OF WASHINGTON, and RUSSELL SANDERS, in his capacity as a Washington State Trooper, and as an individual, et al.,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This case stems from an arrest of James Rogers for driving under the influence of intoxicants, possession of marijuana and drug paraphernalia, and driving with an open container of alcohol. Mr. Rogers filed suit against the Washington State Patrol and Trooper Russell Sanders (hereinafter collectively referred to as "WSP" or "Respondents"), alleging that Trooper Sanders had made an unlawful stop and arrest in violation of Mr. Rogers' Fourth Amendment Rights pursuant to 42 U.S.C. § 1983. Mr. Rogers also made claims of trespass, conversion, and negligence under state statutes, based on the same allegedly unlawful stop and arrest.

Mr. Rogers' constitutional claims are properly dismissed on summary judgment for three independent reasons. First, as a threshold matter, on appeal Mr. Rogers completely fails to address one basis argued by WSP below for dismissing his claims, collateral estoppel. Second, even if he had raised it, Mr. Rogers is collaterally estopped from challenging the probable cause basis for his stop and arrest in this tort matter because the probable cause for his stop and arrest had previously been established in the underlying criminal case. Third, on the merits, there can be no genuine dispute that Trooper Sanders did have probable cause to stop and to arrest Mr. Rogers. Mr. Rogers' state law claims are properly dismissed

because WSP had statutory authority to impound and search Mr. Rogers' vehicle.

This Court should affirm dismissal of Mr. Rogers' claims.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should dismiss Mr. Rogers' claims as a matter of law based on collateral estoppel because the State presented collateral estoppel as a basis for dismissal on summary judgment and on appeal Mr. Rogers neither assigned error nor made argument regarding it.

2. Whether Mr. Rogers' 42 U.S.C. § 1983 claims should be dismissed as a matter of law because he is collaterally estopped from challenging the probable cause underlying his stop and arrest by the previous adjudication of probable cause in his earlier criminal proceeding.

3. Whether Mr. Rogers' 42 U.S.C. § 1983 claims should be dismissed as a matter of law because he has failed to identify any genuine issue of material fact regarding the existence of probable cause for his stop and arrest by Trooper Sanders.

4. Whether the trial court properly exercised its discretion when it excluded the Department of Licensing information regarding Mr. Rogers' license suspension hearing as inadmissible hearsay.

5. Whether Mr. Rogers' state law claims of trespass, conversion, and negligence should be dismissed as a matter of law because

probable cause existed for Mr. Rogers' arrest and the WSP acted within its statutory authority when it impounded and searched Mr. Rogers' vehicle.

III. RESTATEMENT OF FACTS

A. The WSP Stopped Mr. Rogers Based On Erratic Driving and Arrested Him for Driving Under the Influence

WSP Trooper Sanders is a commissioned law enforcement officer trained in traffic law enforcement and detecting impaired drivers. CP at 94. Trooper Sanders' certifications and experience demonstrate his ability to detect motorists who are violating the motor vehicle code, including driving under the influence. CP at 94.

On June 24, 2008, the WSP dispatcher notified Trooper Sanders that a concerned motorist had reported a small blue pickup with a topper was having trouble navigating lane travel on State Route (SR) 104, westbound from the Hood Canal Bridge. CP at 40. As a result, Trooper Sanders headed southbound on SR 19 towards SR 104. CP at 38.

Trooper Sanders observed a small blue pickup truck with a topper failing to maintain lane travel on SR 19—crossing the centerline, drifting to the right, and quickly jerking back to the left. CP at 95.

During the traffic stop, Trooper Sanders detected an odor of alcohol and marijuana emitting from Mr. Rogers' person and vehicle. CP at 95. Trooper Sanders also observed that Mr. Rogers' eyes were

bloodshot, droopy, dilated and watery, and that he had slurred speech and unnecessarily repeated himself. CP at 95. When Trooper Sanders asked Mr. Rogers to exit the vehicle to perform field sobriety tests, Mr. Rogers attempted to hide something under the driver's seat. CP at 39, 95. Mr. Rogers tossed a white tube under the driver's seat which sounded like glass when it hit the metal seat as Mr. Rogers tried multiple times to conceal it. CP at 39.

Trooper Sanders administered the field sobriety tests to Mr. Rogers. CP at 39-40, 95. Mr. Rogers failed the tests. CP at 39-40, 95. Trooper Sanders then placed Mr. Rogers under arrest for suspicion of driving under the influence and possession of marijuana and paraphernalia. CP at 95.

At WSP's request, All-City Towing responded to impound Mr. Rogers' vehicle. CP at 33. All-City Towing found in the vehicle a tin containing a small amount of green vegetable material and some paraphernalia which field tested positive for marijuana. CP at 32, 40.

Back at the station, Mr. Rogers asked to call his private attorney and Trooper Sanders facilitated three such calls. CP at 95. Mr. Rogers provided two valid Blood Alcohol Content (BAC) tests with readings of .023 and .020. CP at 95. In light of the disparity between the BAC results and Mr. Rogers' failing performance on the field sobriety tests,

Trooper Sanders requested an evaluation by a Drug Recognition Expert. CP at 32, 96. Mr. Rogers refused to participate in the evaluation. CP at 32, 96.

B. Mr. Rogers Entered a Plea Agreement in Which He Acknowledged That Probable Cause Existed to Believe He Had Committed the Charged Offenses

Mr. Rogers was charged with Driving Under the Influence, Possession of Marijuana/Drug Paraphernalia, and driving with an open container of alcohol. CP at 96. A judicial determination of probable cause occurred at Mr. Rogers arraignment for the criminal charges. CP at 76, 80. *See* CrRLJ 3.2.1(a) Procedures Following Warrantless Arrest—Preliminary Hearing.

Mr. Rogers subsequently entered into a plea agreement in Jefferson County District Court in his criminal matters for two criminal charges and two infractions. CP at 74-86 (criminal docket summary), 88-93 (plea agreement). In that plea agreement, Mr. Rogers agreed that probable cause existed to believe that he had committed the offenses with which he was charged. CP at 93. The Agreement states: "ORDERED that probable cause exists to believe that the Defendant [Mr. Rogers] committed the offense(s) charged herein. It is further ORDERED that the above Agreement has been entered into freely, voluntarily and knowingly by all

the parties hereto with full awareness and explanation of the possible legal consequences." CP at 93.

C. In a DOL Administrative Proceeding, Mr. Rogers Successfully Challenged the Suspension of His Driver's License

Mr. Rogers challenged the Department of Licensing (DOL) administrative action to suspend his driver's license. CP at 180. Mr. Rogers contested this suspension in a telephonic administrative hearing on October 30, 2008, before a DOL Hearing Officer. CP at 180, 183. At the hearing, only Mr. Rogers provided testimony. CP at 180, 184-224. Mr. Rogers was represented by his attorney. CP at 183. The DOL Hearing Officer, Mr. Rogers, and his attorney were the only hearing participants. CP at 183. The hearing officer did not ask any questions upon the conclusion of Mr. Rogers' direct testimony. CP at 213. The hearing officer dismissed the administrative action against Mr. Rogers.[1] CP at 180.

D. Mr. Rogers Filed Federal Civil Rights and State Law Claims Against the Arresting Trooper, the WSP, and the Towing Company

In April 2011, Mr. Rogers filed federal civil rights claims and state tort claims against the arresting trooper, the WSP, and the towing company (All-City Towing[2]). CP at 1-11. Mr. Rogers claimed that both

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[1] The hearing officer found "Mr. Rogers expressed confusion regarding the blood test after submitting to a BAC test. That confusion was not clarified." CP at 180.

[2] All-City Towing was dismissed on summary judgment in 2013 and no appeal was ever filed, so those issues are not before this Court.

the initial traffic stop and his later arrest violated the Fourth Amendment's prohibition against unreasonable seizure. CP at 1-11. He also made claims under state law for negligence, trespass, and conversion based on the impound of his vehicle.[3] CP at 1-11.

WSP moved for summary judgment, arguing the federal constitutional claims should be dismissed because, (1) probable cause existed for the stop and arrest of Mr. Rogers, and (2) collateral estoppel barred Mr. Rogers from challenging the findings of probable cause based on his plea agreement. CP at 60-70. WSP also sought dismissal of the state law claims based on WSP's statutory authority to tow, impound, and search Mr. Rogers's vehicle subsequent to his arrest. CP at 60-70. In response, Mr. Rogers offered, through his attorney's declaration, his "testimony" regarding the incident in the form of what was purported to be transcript excerpts from the DOL administrative hearing.[4] CP at 98-115. The trial court granted WSP's motion and dismissed Mr. Rogers' action in its entirety.[5] CP at 167-68.[6]

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[3] Mr. Rogers also made claims under 42 U.S.C. § 1983 Municipal Liability against the State of Washington and Malicious Prosecution Under State Law. CP at 7-8. He conceded the dismissal of these causes of action and they are not before this Court on appeal. CP at 115.

[4] Mr. Rogers died March 13, 2012, during the pendency of this lawsuit. CP at 99.

[5] The trial court also granted the motion as it related to Mr. Rogers' negligence claim. CP at 230.

Mr. Rogers moved for reconsideration, arguing that the trial court erred in finding the DOL information amounted to inadmissible hearsay. CP at 169-225. The trial court ruled the DOL hearing testimony was inadmissible under ER 804(b) because Mr. Rogers could produce no qualifying exception.[7] CP at 231; State's Response to Plaintiff's Motion for Reconsideration (filed 6/30/2016) (attached hereto as Appendix A[8]). The trial court denied the motion for reconsideration. CP at 231. This appeal followed.

IV. ARGUMENT

A. Standard of Review

An appellate court's review of a summary judgment is generally the same as that by the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is properly granted where the admissible evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule (CR) 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891,

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[6] Due to a scrivener's error by the State, the trial court's order originally dismissed only the WSP. A corrected order granting summary judgment as to both the WSP and Trooper Sanders was entered on July 27, 2016. CP at 235.

[7] Further, Mr. Rogers failed to provide a certified copy of the hearing testimony to the trial court. Subsequently, Mr. Rogers filed a copy of a purported verbatim transcript prepared by a Certified Court Reporter; however, it was not signed by the court reporter. CP at 225

[8] The record will be supplemented to include this document pursuant to a pending motion to the trial court.

897, 874 P.2d 142 (1994). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the party with the burden of proof at trial fails to establish the existence of an element essential to that party's case, summary judgment must be granted. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2 182 (1989).

B. Mr. Rogers is Collaterally Estopped From Challenging Probable Cause in This Case Because Probable Cause for His Stop and Arrest Was Established in the Criminal Adjudication Proceeding

Collateral estoppel is intended to prevent retrial of crucial issues or determinative facts determined in previous litigation. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957, 961 (2004). Here, the existence of probable cause to stop and arrest Mr. Rogers had previously been determined in the criminal proceeding adjudicating the criminal charges arising out of Mr. Rogers' arrest. The district court in that matter made two separate probable cause findings—at Mr. Rogers' arraignment and when Mr. Rogers entered his plea. Those two findings of probable cause collaterally estop Mr. Rogers from challenging probable cause in this subsequent civil action.

Mr. Rogers' challenge to the underlying probable cause determination for his stop and arrest should be dismissed based on collateral estoppel for two reasons. First, on appeal Mr. Rogers failed to assign error or present argument concerning collateral estoppel as a basis for dismissing his claims. As a result, this alternative basis for affirming dismissal of his claims stands unchallenged. Second, Mr. Rogers is collaterally estopped from challenging probable cause in this matter because probable cause was established in the underlying criminal case.

1. On Appeal Mr. Rogers Failed to Challenge Collateral Estoppel as a Basis for Dismissing His Claims

On appeal to this Court, Mr. Rogers failed to assign error or present any argument concerning the issue of whether he is collaterally estopped from challenging probable cause in this proceeding. Instead, he limited his arguments to whether a genuine issue of material fact exists as to the validity of the traffic stop/subsequent arrest and the towing/impound of his vehicle, and the trial court's decision to not consider his DOL testimony. Plaintiff-Appellant's Opening Brief (Appellant's Br.) at 1-3.

Review of an appeal is limited to the issues referenced in the assignments of error and argument provided in the opening brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Mr. Rogers did not assign error or present argument

concerning this issue in his opening brief, and thereby waived his ability to challenge this dispositive issue on appeal. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *Cowiche Canyon*, 118 Wn.2d at 809 (plaintiffs waived assignment of error by failing to present argument in their opening brief); *McKee v. Am. Home Prod., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) ("We will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority."); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011 (2015) (an appellate court will not consider a claim of error that a party fails to support with legal argument in an opening brief).

Moreover, the Court should discourage the "strategy" of reserving issues only to reveal them for the first time in the appellant's reply brief. Such a practice violates Rules of Appellate Procedure (RAP) 10.3(c) and leads to an unbalanced and incomplete development of the issues for review because it unfairly prevents the respondent from fully answering the appellant's claims. *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160, 167 (1994); *see also Wood v. Postelthwaite*, 82 Wn.2d 387, 389, 510 P.2d 1109 (1973); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78, 322 P.3d 6, n.20 (2014). Accordingly, the Court should strike any attempt by Mr. Rogers to raise this issue for the first time in his reply.

By failing to address the issue of collateral estoppel, Mr. Rogers has waived his ability to challenge this dispositive issue on appeal. This essentially renders the issues Mr. Rogers did address in the opening brief moot, since, even if Mr. Rogers's argument on those other issues had merit, summary judgment must still be affirmed on this dispositive and unaddressed ground.

2. Mr. Rogers is Collaterally Estopped From Challenging The Probable Cause Underlying His Arrest by the Previous Adjudication in His Criminal Proceeding

Collateral estoppel, or issue preclusion, bars re-litigation of an issue in a subsequent proceeding involving the same parties. *Christensen*, 152 Wn.2d at 306 (citing 14A Karl B. Tegland, Washington Practice: *Civil Procedure* § 35.32 at 475 (1st ed. 2003)). For collateral estoppel to apply, the party seeking application of the doctrine must establish that: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen*, 152 Wn.2d at 305-06, 96 P.3d at 960 (2004).

Here, all four elements of collateral estoppel are satisfied. First, the primary issues in the two matters are identical—whether Trooper Sanders had probable cause to first stop and then arrest Mr. Rogers. In his criminal adjudication, Mr. Rogers stipulated to an agreement in which the district court made a finding of probable cause that he had "committed the offense(s) charged herein."[9] CP at 93. Mr. Rogers has provided no argument or legal basis as to why these two findings should not be admissible or controlling in this matter. The first element of collateral estoppel is met.

Second, a final judgment on the merits occurred with the probable cause determination at the criminal hearing. Except in the context of a motion to suppress,[10] Mr. Rogers would not have been able to raise the issue again at trial or on appeal from a verdict. *See Haupt v. Dillard*, 17 F.3d 285, 289 (9th Cir. 1994). The second element for collateral estoppel is met.

Third, the party against whom collateral estoppel is asserted, Mr. Rogers, was a party to the prior adjudication. Mr. Rogers was the defendant in the criminal proceeding before the district court adjudicating

[9] One of the charges was Driving Under the Influence, thereby requiring the need for probable cause for the stop. *See* RCW 46.61.502

[10] No motion to suppress was ever filed on Mr. Rogers' behalf in the seven months the matter was pending. CP at 74-86.

the criminal charges against him. The third element for collateral estoppel is met.

Fourth, the application of the doctrine will not work an injustice on the party against whom the doctrine is applied. Mr. Rogers had the opportunity to fully defend himself in the criminal matter. Mr. Rogers was represented by legal counsel throughout his criminal proceedings, yet not once did he challenge the findings of probable cause. CP at 74-86. If anything, the injustice would be against WSP if Mr. Rogers were allowed to take two completely contradictory positions in order to further his claim before this Court. Therefore, the fourth element for collateral estoppel is met.

Mr. Rogers is collaterally estopped here from challenging the probable cause for his stop and arrest, because the existence of probable cause for the stop and arrest was determined in the earlier adjudication of the criminal charges against him. As a result, Mr. Rogers' 42 U.S.C. § 1983 claims fail, because those claims are based on the lack of probable cause to stop and to arrest him. This Court should affirm the trial court's dismissal of Mr. Rogers' claims based on collateral estoppel.

C. Mr. Rogers' § 1983 Claims Must Be Dismissed Because He Has Identified No Genuine Issue of Material Fact About the Probable Cause Basis for His Stop and Arrest By Trooper Sanders

1. No Genuine Issue of Material Fact Exists as to Trooper Sanders' Probable Cause to Make the Initial Stop

Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). A traffic stop that is based on a police officer's reasonable suspicion of either criminal activity or a traffic infraction is such an exception. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). An officer may make a warrantless investigative stop based on a reasonable, articulable suspicion of unlawful conduct by a driver. *State v. Jones*, 186 Wn. App. 786, 790, 347 P.3d 483, 485 (2015). *See also State v. Huffman*, 185 Wn. App. 98, 100, 340 P.3d 903, 904 (2014) (holding that defendant's single crossing of her vehicle over the centerline of the roadway provided police officer with probable cause to conduct traffic stop).

Courts evaluate the totality of the circumstances in reviewing the validity of an investigative stop, specifically, articulable facts observed by the trooper and the trooper's training and experience identifying impaired drivers. *Jones*, 186 Wn. App. at 792-93, 347 P.3d at 486 (2015) (citing *State v. McLean*, 178 Wn. App. 236, 245, 313 P.3d 1181 (2013), *review*

denied, 179 Wn.2d 1026 (2014)). The totality of the circumstances includes both the subjective intent of the officer and the objective reasonableness of the officer's behavior. *Ladson*, 138 Wn.2d at 358-59.

A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012).

In *McLean*, this Court upheld a traffic stop because the officer had a reasonable suspicion that McLean was driving under the influence. *State v. McLean*, 178 Wn. App. 236, 245, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014). The officer observed McLean's vehicle weave within its lane and cross onto the fog line three times. *McLean,* 178 Wn. App. at 245. These observations, coupled with the officer's training and experience in identifying driving under the influence, led this Court to hold that it was rational for the officer to infer that a substantial possibility existed that McLean was driving under the influence. *Id.* That substantial possibility established a reasonable suspicion which permitted the warrantless traffic stop. *Id.*

This case is analogous to *McLean*. Here, Trooper Sanders had a reasonable suspicion that Mr. Rogers was driving under the influence. Trooper Sanders responded to a report of an erratic vehicle matching the

description of Mr. Rogers vehicle's and observed that vehicle operating with the classic signs of a motorist driving under the influence of alcohol or drugs. CP at 38; 95, ¶ 4. It was rational for Trooper Sanders to infer that a substantial possibility existed that Mr. Rogers was driving under the influence which established a basis for a warrantless traffic stop.

Similarly, a recent unpublished decision from this Court found a stop was lawful based on a reasonable suspicion of impaired driving after the trooper observed classic signs of driving under the influence at 2:00 a.m. *State v. Karlson*, No. 47346-1-II, 195 Wn. App. 1050 (August 23, 2016) (WL 4471000).[11] The trooper in *Karlson* observed a vehicle weave within the lane of travel, drift over the fog line onto the shoulder, and veer back into the lane of travel. *Id.* Upon contact with the driver the trooper smelled alcohol and the driver failed field sobriety tests. Lastly, the trooper was trained in traffic law enforcement and detecting impaired drivers. *Id.*

In *McLean* and *Karlson*, the officers: observed the vehicles failing to maintain lane travel, possessed specialized training in identifying impaired drivers, and stopped the drivers because of suspected impaired driving. As in *McLean* and *Karlson,* the totality of the circumstances here

[11] *See* WA R Gen GR 14.1(a). The decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

established that Trooper Sanders had reasonable suspicion to stop Mr. Rogers to investigate whether he was driving under the influence.

Mr. Rogers erroneously relies upon *State v. Jones* to argue that the stop of Mr. Rogers was unlawful. But that court's holding was based on different facts. In *Jones*, an officer, in her patrol car, followed Jones for about one mile, observed Jones' vehicle pass over the fog line approximately an inch three times, and stopped Jones' vehicle due to erratic lane travel. *Jones*, 186 Wn. App. at 788. There were no vehicles on the road. *Id.* The State presented no evidence about the officer's training and experience in identifying impaired drivers nor was there evidence that the officer suspected the driver was impaired or that the officer stopped him for this reason. *Jones*, 186 Wn. App. at 793. The court held, "Because the State failed to justify its warrantless seizure of Jones, the trial court should have suppressed the evidence discovered because of that seizure." *Id.*

Here, Trooper Sanders received notice of an erratic driver from a concerned motorist via WSP dispatch. CP at 38. There were other motorists present and this area of highway traverses a waterway. When Trooper Sanders observed Mr. Rogers' vehicle, he observed what he believed to be multiple instances of Mr. Rogers failing to properly maintain his lane, consistent with an impaired driver. CP at 95, ¶ 4. Based

upon his training as a WSP trooper, and after observing Mr. Rogers leaving his lane of travel twice to go onto the centerline, then jerking the steering wheel back to correct, Trooper Sanders initiated a traffic stop due to the suspicion that Mr. Rogers was operating his motor vehicle while impaired. CP at 95, ¶ 4.

Accordingly, the trial court did not err in determining that there was probable cause for the traffic stop given the totality of the circumstances, and thus did not err in granting WSP's motion for summary judgment as it related to the stop.

2. No Genuine Issue of Material Fact Exists as to Trooper Sanders' Probable Cause to Make the Subsequent Arrest

" '[P]robable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed.' " *O'Neill v. Dep't of Licensing*, 62 Wn. App. 112, 116-17, 813 P.2d 166 (1991) (quoting *Waid v. Dep't of Licensing*, 43 Wn.App.32, 34-35, 714 P.2d 681 (1986) (alteration in original)). *see also City of Coll. Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43 (2002) (holding police officer possessed probable cause to arrest defendant for DUI based on driver emitting smell of alcohol, possessing bloodshot and watery eyes,

and failing field sobriety tests); *State v. Smith,* 130 Wn.2d 215, 223-24 n.4, 922 P.2d 811 (1996).

Here, Trooper Sanders, with all of his training as a law enforcement officer, was faced with the following situation: he could smell alcohol and marijuana; he observed what appeared to be marijuana paraphernalia and Mr. Rogers' attempt to hide it; Mr. Rogers was exhibiting symptoms (slurred speech, bloodshot eyes, etc.) consistent with someone who was under the influence of intoxicants; and Mr. Rogers failed the field sobriety tests that he performed. CP at 95, ¶ 5(a)-(d). Mr. Rogers' failed performance on the field sobriety tests indicated that Mr. Rogers was intoxicated (by either alcohol and/or marijuana). CP at 39-40; 95, ¶ 6. Based on the totality of this information, Trooper Sanders made the decision to arrest Mr. Rogers. CP at 95, ¶ 6.

Mr. Rogers' arguments that there was no probable cause are based on a mischaracterization of the facts and are unsupported by the information that was provided to the trial court. Appellant's Br. at 20-21. Mr. Rogers asserts "the trooper's claims that he smelled alcohol is not accurate." Appellant's Br. at 20. But Mr. Rogers had consumed alcohol prior to his contact with Trooper Sanders, based on the BAC test results, and based on Mr. Rogers' own statements. CP at 95, ¶ 8. Whether the smell of alcohol emanated from Mr. Rogers or his vehicle, Trooper

Sanders was able to detect the smell of alcohol. CP at 95, ¶ 5(a). Coupled with how Mr. Rogers had been operating his vehicle, this added to the growing list of facts that supported Trooper Sanders' bases to arrest Mr. Rogers for DUI.

Mr. Rogers also argues "the trooper's claims he smelled marijuana is not accurate." Appellant's Br. at 20. But Mr. Rogers' truck contained marijuana and drug paraphernalia. CP at 35-36, 40. Trooper Sanders observed a green vegetable matter in the truck. CP at 40. Marijuana was also found by a third person. CP at 33. Mr. Rogers does not provide any basis for the supposed first-hand knowledge as to what and how Trooper Sanders could smell at the time of his contact with Mr. Rogers.

Finally, Mr. Rogers relies on information that he provided in DOL hearing testimony. But the trial court excluded that information as inadmissible hearsay. *See* Section IV, D below.

Further, arguments about discovery disputes are a red herring. Appellant's Br. at 7-8, 19-21; CP at 129. Mr. Rogers argues that his "questions regarding discovery" as it pertains to the open container, odor of marijuana, and the positive field test for marijuana amount to genuine issues of material fact. CP at 129; Appellant's Brief at 20.[12] However, no

[12] Mr. Roger's counsel sent an email two days before the responsive materials were due asking questions about some of the statements in Trooper Sanders' report. CP at 129.

law is cited for that proposition. This is not a basis sufficient to create an issue of fact that probable cause did not exist as a matter of law.

D. The Trial Court Properly Excluded DOL Information Because it is Inadmissible Hearsay

In his response to the State's motion for summary judgment, Mr. Rogers introduced a purported transcript from his administrative DOL hearing. CP at 123-27. Mr. Rogers attempted to introduce DOL hearsay testimony to create a genuine issue of material fact as to his arrest for DUI because Mr. Rogers died during the pendency of this case.[13] The trial court excluded the DOL information as inadmissible hearsay. Mr. Rogers moved for reconsideration and introduced a second more elaborate purported transcript. CP at 169, 182-229. The trial court denied Mr. Rogers' motion for reconsideration. CP at 231. Because the trial court properly excluded the DOL information, this Court should affirm its justified decision.

1. Mr. Rogers' Statements During the DOL Hearing Are Inadmissible Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* Evidence Rule (ER) 801(c). Hearsay is

[13] Mr. Rogers was arrested June 24, 2008; the DOL hearing occurred October 30, 2008; Mr. Rogers died on March 13, 2012; the Motion for Summary Judgment was filed on February 16, 2016.

inadmissible as evidence unless it falls within a recognized exception to the hearsay rule. ER 802.

Mr. Rogers argues that his statements in the DOL hearing fall within the "former testimony" exception to the hearsay rule. Appellant's Br. at 25-28. The Former Testimony rule provides:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

See ER 804(b)(1). A declarant is unavailable as a witness if they are unable to be present or to testify at the hearing because of death. *See* ER 804(a)(4).

Here, Mr. Rogers is unavailable as a witness, due to his death on March 13, 2012. Mr. Rogers' counsel attempts to rely on "testimony" provided by Mr. Rogers at his DOL hearing in order to establish genuine issues of material fact. However, this information fails to satisfy the former testimony exception because it was not subject to cross examination.

Mr. Rogers was not subject to cross-examination by WSP or a predecessor in interest and, therefore, his testimony was not subject to the "former testimony" hearsay exception contained in ER 804(b)(1). The

predecessor in interest requirement of the former testimony rule does not apply as between the DOL and the WSP. These entities are two separate, distinct government agencies. Each agency has its own set of Washington Administrative Code regulations.[14] Mr. Rogers makes the erroneous and unsupported claim that simply identifying a state agency as a "party" somehow lumps every agency together under the umbrella of the State of Washington. Appellant's Br. at 27. Mr. Rogers provides no legal authority for his claim that "[i]t is also clear that the State was a 'predecessor in interest. . . .' " Appellant's Br. at 27.

There was neither opportunity nor similar motive to develop Mr. Rogers' DOL testimony at the implied consent hearing. DOL did not have a similar motive to develop Mr. Rogers' testimony because the arresting officer's report establishes prima facia evidence and it is automatically admissible. Pursuant to RCW 46.20.308(7), "the sworn report or report under declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving . . . under the influence. . . ." Further under RCW 46.20.308(7), the sworn report/declaration "shall be admissible without further evidentiary foundation. . . ." Given that Trooper Sanders' report and supporting

[14] For DOL, the operative WAC codes are found under Titles 36, 98, 196 and 308. For WSP, the operative WAC codes are found under Titles 204, 212 and 446.

documentation was automatically deemed admissible, there was no reason to develop Mr. Rogers' testimony beyond what was presented through his attorney's examination.

Additionally, there was no similar opportunity for WSP to develop the testimony at the hearing. The Legislature intentionally established a relatively informal and certainly streamlined administrative process for implied consent hearings. *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 525, 173 P.2d 259 (2007). Because Trooper Sanders' report was deemed admitted without the need for any foundation, the Legislature's intent to streamline these types of hearings, and the lack of any reference to rights of the responding party at such a hearing, there was no similar motive or opportunity for DOL to develop Mr. Rogers' testimony through cross-examination.

The burden was on Mr. Rogers to satisfy the hearsay exception, and that burden was not met. Accordingly, this Court should affirm the trial court's ruling.

2. There Is No Genuine Issue of Material Fact Within the DOL Hearing Regarding Probable Cause

Even if this Court were to consider Mr. Rogers' DOL hearing information, it would not create a genuine issue of material fact with respect to Trooper Sanders having had probable cause to stop and to arrest

Mr. Rogers. Mr. Rogers admitted to consuming alcohol. CP at 194-95. Mr. Rogers did not deny driving in the manner that was observed by Trooper Sanders. To the contrary, Mr. Rogers' testimony was that he was "hand-rolling a cigarette" and using his knee to steer his vehicle at the time of his erratic lane travel. CP at 196-97.

Mr. Rogers' DOL testimony did not address the findings of probable cause in the criminal proceedings. Mr. Rogers' testimony contained general statements that, even if considered in a light most favorable to him, provide little or no actual evidence beyond speculations, argumentative assertions, beliefs and/or conclusions. These are insufficient to create a genuine issue of fact. *White*, 131 Wn.2d at 9 (citing *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). Mr. Rogers admitted to drinking and driving poorly the night of his arrest for DUI. Again, the Court should affirm the trial court's ruling.

E. The Trial Court Properly Dismissed Mr. Rogers' State Law Claims of Negligence, Trespass, and Conversion Based on Common Law and Statutory Authority

In addition to his federal claims, Mr. Rogers also raises state law claims--trespass and negligence, based on his arrest; and conversion, based on the subsequent impound of his truck.[15] The trial court properly dismissed these claims because there was probable cause for the stop and

[15] Mr. Rogers' argument for these three state law claims amounts to one page. Appellant's Br. at 21-22.

arrest. In addition, each of the state law claims fail for the additional reasons discussed below.

1. Mr. Rogers' Negligence Claim Fails Because Mr. Rogers Fails to Identify Any Actionable Duty Owed to Him, Much Less a Breach of Such a Duty

Negligence requires: duty, breach, proximate cause, and damages. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996); *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 563, 54 P.3d 197 (2002), *rev. denied*, 149 Wn.2d 1012 (2003). The threshold determination is whether a duty is owed to the plaintiff. *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). Whether or not a duty exists is a question of law. *Osborn v. Mason Cty.*, 157 Wn.2d 18, 22-23, 134 P.3d 197 (2006). Whether WSP owed Mr. Rogers an actionable duty in tort is a question of law. *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001); *Stenger v. State*, 104 Wn. App. 393, 399, 16 P.3d 655 (2001), *rev. denied*, 144 Wn.2d 1006 (2001).

Mr. Rogers bases his negligence claim on his contention that WSP had a duty not to engage in his unlawful stop and arrest. Specifically, Mr. Rogers contends: "The trooper had a duty not to stop Mr. Rogers without observing a traffic violation. The trooper had a duty to Mr. Rogers not to arrest him without probable cause." Appellant's Br. at 21-22. But the "duties" Mr. Rogers identifies are not actionable duties owed

specifically to Mr. Rogers—they are duties owed by law enforcement to the public at large.

Public safety and law enforcement are duties owed to the public at large. In other words,

> To be actionable, the duty must be owed to the injured plaintiff, and not one owed to the public in general. This basic principle of negligence law is expressed in the "Public Duty Doctrine". Under the Public Duty Doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breach was owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general. . . ."

Cummins v. Lewis Cty., 156 Wn.2d 844, 852, 133 P.3d 458 (2006) (citations omitted) (citing *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (quoting *J & B Dev. Co. v. King Cty.*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983))). The motor vehicle statutes protect and preserve the welfare of the public generally, but do not create duties to protect individual citizens from harm.

Here, Mr. Rogers attempts to invent a "general affirmative duty toward the public." CP at 8. Yet no such duty exists. If the duty breached by the governmental entity was merely the breach of an obligation owed to the public in general, then a cause of action would not lie for any individual injured through the breach of that duty. *See Caldwell v.*

City of Hoquiam, 194 Wn. App. 209, 373 P.3d 271 (2016), *rev. denied,* 186 Wn.2d 1015 (2016) (trial court erroneously entered judgment on jury verdict finding City liable for failure to impound dog); *Weaver v. Spokane Cty.*, 168 Wn. App. 127, 275 P.3d 1184 (2012*), review denied*, 175 Wn.2d 1011 (2012); *Pierce v. Yakima Cty.*, 161 Wn. App. 791, 251 P.3d 270 (2011), *review denied*, 172 Wn.2d 1017 (2011) (trial court properly dismissed claim against county alleging negligent inspection of propane tank installation).

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship.

Mr. Rogers has failed to identify any exception to the public duty doctrine that would apply; instead, he simply argues that Trooper Sanders had a duty not to stop Mr. Rogers without observing a traffic violation and not to arrest him without probable cause. Appellant's Br. at 21-22. Appellant does not identify how these claims satisfy any of the exceptions to the public duty doctrine. Even if WSP did owe such a duty, there was no breach because probable cause existed to stop and arrest. *Supra* Section C. The trial court properly dismissed Mr. Rogers' claim for negligence as a matter of law and this Court should affirm.

2. Mr. Rogers' Conversion & Trespass to Personal Property Claims Fail Because There Is Statutory Authority to Secure the Vehicle of a Suspected DUI Driver

Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. *Pub. Util. Dist. No. 1 of Lewis Cty. v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985) (citing *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)).

Trespass to chattels is the intentional interference with a party's personal property without justification that deprives the owner of possession or use. *See* Restatement (Second) of Torts § 217 (1965).

Mr. Rogers claims WSP is liable for conversion for the impound of his truck. Appellant's Br. at 21. But whenever the driver of a vehicle is arrested and taken into custody by a police officer, that police officer may also take custody of the vehicle, at his discretion, and provide for its prompt removal to a place of safety. *See* RCW 46.55.113(2)(d). A "place of safety" may include the business location of a registered tow truck operator. *See* RCW 46.55.113(4).

On the night of the incident, Mr. Rogers was arrested for DUI (as well as possession of Marijuana and Paraphernalia), and taken into

custody by Trooper Sanders. CP at 95, ¶ 6. Following his arrest, Mr. Rogers' vehicle was towed by a registered tow truck operator with an appointment with WSP. CP at 95, ¶ 6.

Trooper Sanders had probable cause to stop and arrest Mr. Rogers for, at a minimum, driving under the influence. A statute, RCW 46.55.113(2)(d), provided the lawful justification for Trooper Sanders to take custody of Mr. Rogers' vehicle. Mr. Rogers fails to argue that Trooper Sanders did not have statutory authority.

Mr. Roger's reliance on *Potter v. Washington State Patrol* is misplaced. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 89, 196 P.3d 691, 702 (2008). Mr. Rogers relies on *Potter* for the premise that the State is liable under a theory of conversion for an unlawful impound. Appellant's Br. at 22. However, that is an incomplete analysis of the holding in *Potter*. *Potter* involved only whether the statute regarding redemption procedures for impounded cars bars a conversion claim. *Potter*, 165 Wn.2d at 77. The court held that the redemption procedures are not the exclusive method to challenge an unlawful impound and a conversion action against WSP can be valid. *Id.* at 67.

Unlike *Potter*, this case does not involve an untimely challenge to the procedure for redeeming an impounded vehicle and an effort to seek a claim in conversion. Mr. Rogers never challenged the redemption

procedures and is really challenging whether WSP had the authority to impound his vehicle in the first place. Mr. Rogers' situation is unlike that of Mr. Potter, who had failed to timely challenge the redemption procedures and hoped to find another legal theory to challenge the impound of his vehicle. *Potter*, 165 Wn.2d at 72-73, 196 P.3d at 693-94. There is no such challenge to the redemption procedures here because Mr. Rogers paid the requisite fees and never challenged them prior to this claim of conversion. CP at 59. Accordingly, *Potter* does not support Rogers' claim of conversion. Rather, the trial court properly dismissed the claims of conversion and trespass as a matter of law based on statutory authority. Therefore, this Court should affirm the trial court's decisions.

V. CONCLUSION

For each of the reasons stated, WSP and Trooper Sanders asks this Court to affirm the trial court's summary judgment order that dismissed this action in its entirety.

RESPECTFULLY SUBMITTED this 20th day of January, 2017.

ROBERT W. FERGUSON
Attorney General

s/*Patricia D. Todd*
PATRICIA D. TODD, WSBA No. 38074
Assistant Attorney General

NO. 49123-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAUL CULLEN, Personal Representative of the Estate of James Crampton Rogers, Appellant, v. STATE OF WASHINGTON, et al., Respondents.	(Jefferson County Cause No. 11-2-00078-7) CERTIFICATE OF SERVICE

I, Amanda Trittin, hereby certify that on January 20, 2017, I caused to be sent for service a copy of the foregoing document entitled RESPONDENTS' BRIEF on the attorney for Appellant, as set forth below:

Attorneys for Appellant:	[ ] United States Mail [ ] Hand Delivered by Legal Messenger
John R. Muenster Muenster & Koenig 14940 Sunrise Dr NE Bainbridge Island, WA 98110	[x] FedEx Overnight Mail [**x**] Email

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of January, 2017, at Olympia, WA.

s/*Amanda Trittin*
AMANDA TRITTIN

APPENDIX

A

STATE OF WASHINGTON

JEFFERSON COUNTY SUPERIOR COURT

PAUL CULLEN, Personal Representative of the Estate of James Crampton Rogers, Plaintiff, v. THE STATE OF WASHINGTON and RUSSELL SANDERS, in his capacity as a Washington State Trooper, and as an individual, Defendants.	NO. 11-2-00078-7 DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

COMES NOW the Defendants, State of Washington ("State") and Trooper Russell Sanders ("Trooper Sanders") and makes this response to the Plaintiff's Motion for Reconsideration pursuant to Civil Rule 59(a)(7) and (9).

I. INTRODUCTION

Plaintiff states, in the reconsideration motion, that "[w]e object to the decision in its entirety. Here, we discuss the Court's decision to disregard the transcript of Mr. Rogers' sworn testimony...." Plaintiff's narrow focus as to a purported error on the part of the Court is insufficient to warrant a reversal of the order granting summary judgment to the State Defendants. Plaintiff has presented no evidence or reasonable inference that Plaintiff's claims do not fail, as a matter of law, because probable cause was established and Plaintiff presented

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no admissible evidence to the contrary to justify the Court's changing of its decision. Accordingly, Plaintiff has failed to meet his burden under CR 59.

II. ARGUMENT

A. Plaintiff Ignores the Other Multiple Findings of Probable Cause

In the motion's conclusion, Plaintiff states that "[t]he Estate submitted other evidence in support of its motion..." However, Plaintiff does not identify how that information necessarily warrants the Court to reconsider its original decision. Plaintiff also, conveniently, ignores the fact that probable cause for the traffic stop was established multiple times. That, alone, is fatal to Plaintiff's claim.

Tellingly, the administrative order filed by Plaintiff shows that the basis for dismissal of his license suspension/revocation was the result of Plaintiff "express[ing] confusion regarding the blood test after submitting to a BAC test." Nowhere in the administrative order is there a finding that Trooper Sanders lacked probable cause to initiate a traffic stop of Plaintiff. Plaintiff again fails to address that portion of the Defendants' argument(s).

Additionally, Plaintiff has failed to establish how the Court's decision to not consider the DOL transcript is contrary to law or how the Court's dismissal of the negligence and conversion/trespass claims was in error. Plaintiff provided no legal theory as to how any of the exceptions to the Public Duty Doctrine applied to him. Plaintiff's motion consists of cursory arguments not supported by fact or law.

B. The Former Testimony Rule

In order for Plaintiff's DOL hearing testimony to be admissible under 804(b), he must meet one of the exceptions enumerated under that section. Here, Plaintiff appears to agree with the Defendants that subsection (1) (Former Testimony) would be the applicable

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exception, if one were to exist. However, for the reasons enumerated below, this exception does not apply in this matter.

1. The Washington State Patrol Was Not A Party To Plaintiff's DOL Hearing

The Department of Licensing and the Washington State Patrol are two separate, distinct government agencies. Each agency has its own set of Washington Administrative Code regulations. Plaintiff's counsel is operating under the erroneous presumption that simply identifying a state agency as a "party" somehow lumps every agency together under the umbrella of the state of Washington. Plaintiff's blanket statement that "the State was a 'predecessor in interest" is not supported by any explanation or legal argument.

2. There Was No Opportunity Or Similar Motive To Develop Testimony

The legislature intentionally established a relatively informal and certainly streamlined administrative process for implied consent hearings.[1] One purpose of the implied consent law is to avoid lengthy litigation of license suspension and revocation proceedings.[2] The hearings are limited in scope, may be held telephonically, and are held before an agency employee who is not required to have legal training.[3] This streamlined procedure is consistent with allowing relevant evidence without regard to the highly technical rules governing hearsay and foundation.[4]

Pursuant to RCW 46.20.308(7), "the sworn report or report under declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been

[1] *Ingram v. Department of Licensing*, 162 Wn.2d 514, 525, 173 P.2d 259 (2007).
[2] *Id.*
[3] *Id.*
[4] *Id.*

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driving...under the influence..." Further, that section provides that the sworn report/declaration "shall be admissible without further evidentiary foundation..."

Based on the legislature's intent to streamline these types of hearings, as well as the fact that Trooper Sanders' report is deemed admitted without the need for any foundation, there is no motive for the Department of Licensing to develop the testimony through cross-examination. The burden shifted to Plaintiff to combat Trooper Sanders' report and its attachments, and there would be no need for the Department of Licensing to engage in the cross-examination of the petitioning party.

In addition, WAC 308-103-150 describes the conduct of DOL hearings, as well as the duties of the hearing officer. It is true that the hearings officer (pursuant to WAC 308-103-150(7)) has the ability to ask questions "to develop any facts deemed necessary to fairly and adequately decide the matter." However, Plaintiff's argument as to the hearings officer's role ignores the fact that the hearing officer is supposed to be a neutral, unbiased third-party. For example, the hearings officer would not able to lodge objections as to the examination of the petitioner, by petitioner's counsel, as the hearing officer would be the person ruling on the objections.

Further, at no point does WAC 308-103-150 provide for the respondent (in this case, the DOL) to put forth its case in chief through questioning, etc. All references to cross-examination opportunities are in regards to the petitioner. In fact, the term "respondent" is not used in this WAC. Therefore, the WAC does not actually provide the opportunity for cross-examination by the respondent, DOL.

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Finally, Plaintiff cites to a concurring opinion in a United States Supreme Court case[5] to support his argument; however, this matter provides little, if any, support to Plaintiff's argument. In *Salerno,* the District Court denied the respondents' request to admit grand jury testimony, pursuant to Federal Rule of Evidence 804(b)(1)[6], at the later criminal trial on the basis that the "prosecutor's motive in questioning a witness before the grand jury is different from his motive in conducting the trial."[7] The Second Circuit Court of Appeals had reversed the District Court's ruling. The United Sates Supreme Court subsequently reversed the Second Circuit and remanded the matter regarding the 804(b)(1) issue.

3. Court Reporter Certification

One of the objections made by the Defendants in their reply brief was that there was no information regarding who actually transcribed the audio recording from the DOL hearing. Plaintiff's counsel's certification that the transcript excerpt was a "true copy" did not in any way address that issue, particularly given the lack of authentication in the first place.

It is clear that Plaintiff's counsel had the opportunity to provide the Court with an actual certified transcript of the hearing, as he has now done with this filing. Plaintiff's counsel simply chose not to do so. It is also clear that Plaintiff missed the whole point of the argument – an unknown person prepared a transcript purportedly from a recording that had never been provided to the Defendants' counsel.

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[5] *United States v. Salerno,* 505 U.S. 317, 112 S.Ct. 2503, 120 L.Ed. 2d 255 (1992).

[6] FRE 804(b)(1) has the same elemental requirements as Washington's ER 804(b)(1); it is simply worded differently.

[7] *Salerno,* 505 U.S. at 317.

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Further, Plaintiff's argument that there was no court reporter certification requirement ignores RCW 2.32.250, which states the following:

> The report of the official reporter, when transcribed and certified being a correct transcript of the stenographic notes of the testimony, or other oral proceedings had in the matter, shall be prima facie a correct statement of such testimony or other oral proceedings had, and the same may thereafter, in any civil cause, be read in evidence as competent testimony, when satisfactory proof is offered to the judge presiding that the witness originally giving such testimony is then dead or without the jurisdiction of the court, subject, however, to all objections the same as though such witness were present and giving such testimony in person.

Further, Plaintiff's counsel states in his declaration that "the State did not object to the form or content of the DOL hearing transcript we provided until the State filed its reply memorandum..."[8] This is not relevant, as it was Plaintiff's counsel's decision to file documentation with the Court that was objectionable. Until Plaintiff's counsel made the decision to use this information in support of the motion opposition, there would be no reason to object by the Defendants.

II. CONCLUSION

Plaintiff has the burden to establish affirmatively that there is a material issue of fact as to each and every element of his claims.[9] Even if the Court were to consider the DOL transcript, or had considered that transcript in the first place, the information contained in that transcript does not enable Plaintiff to meet this burden.

Further, Plaintiff again fails to address the issue that probable cause was found on multiple occasions, which is fatal to his claims. All of Plaintiff's claims remain insufficient as a matter of law based on the establishment of probable cause and the lack of any admissible

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[8] See the second *Decl. of John R. Muenster*, p. 4, ¶ 9.

[9] See *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d. 182 (1989) (adopting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); CR 56 (e).

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evidence to the contrary. Therefore, the Court should deny the Plaintiff's Motion for Reconsideration.

DATED this 29th day of June, 2016.

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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2016, at Tumwater, Washington.

Cynthia A. Meyer, Legal Assistant

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WASHINGTON STATE ATTORNEY GENERAL

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